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August 16, 1993

Bruce A. Romano, Esq.
Federal Communications Commission
Mass Media Bureau, Room 8010
2025 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-266

Dear Bruce:

Per our discussion, I am enclosing pages from Time Warner Entertainment's "Opposition To Petitions For Reconsideration" (filed July 21, 1993) addressing challenges to the preemption of franchise provisions requiring a "big basic" tier.

In addition, please note that arguments to the effect that preemption of big basic tier renders Section 625(d) of the 1984 Act a nullity ignore the fact that Section 625(d) applies both to basic tiers and cable programming service tiers, while the preemption only applies to basic. After September 1, 1993 (when rate regulation becomes effective), Section 625(d) will apply to the retiering of cable programming service tiers where the size of such tiers is specified in an enforceable franchise provision.

If you have any questions, please do not hesitate to call.

Sincerely,

Seth A. Davidson

Enclosure

cc: Acting Secretary W. Caton
S. Wilson
B. Johnson
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Further, NATOA requests that the Commission revise Section 76.914 of its Rules to provide that revocation will not be ordered unless the Commission determines that local implementation substantially and materially interferes with the Commission's rules or the 1992 Cable Act.[68] Time Warner objects that NATOA's proposed change would fundamentally alter the established federal/local regulatory framework of the 1992 Cable Act. The Act clearly delineates a general scheme of basic service rate regulation: the Commission establishes regulations and the local authority enforces the regulations.[69] NATOA's proposal would invite the promulgation of disparate and inconsistent regulations across the country. This would clearly violate the 1992 Cable Act's mandate for regulatory uniformity: "[n]o Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section."[70] The Commission's regulations and benchmark tables are not merely a recommended approach for local regulators who may decide to embellish on the Commission's work; the local authorities must conform precisely to these regulations or risk revocation.

X. EXISTING FRANCHISE AGREEMENTS ARE PROPERLY PREEMPTED TO THE EXTENT THEY MANDATE SERVICES ON THE BASIC TIER ABOVE THE MINIMUM STATUTORY REQUIREMENT.

NATOA and King County have asked the Commission to reconsider its determination that the statutory definition of the basic service tier contained in the 1992 Cable Act preempts provisions in franchise agreements that require additional services to be carried on the basic

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[68]NATOA at 28.

[69]47 U.S.C. § 543(b)(1) (Commission establishes regulations); 47 U.S.C. § 543(b)(5)(A) (cable operators implement and local authorities enforce Commission rate regulations).

[70]47 U.S.C. § 543(a)(1).

tier.[71] In making this request, NATOA and King County rely on two principal arguments: (1) preemption conflicts with provisions of the 1984 Cable Act; and (2) preemption is not required by the 1992 Cable Act. As discussed below, these arguments are without merit. Accordingly, Time Warner urges the Commission to reject the petitioners' recommendations.

First, King County and NATOA both argue that the Commission's decision preempting non-federal basic tier requirements renders Section 625(d) of the 1984 Cable Act a nullity. This argument simply is in error. Section 625(d) was enacted to protect a cable operator's right to retier, despite franchise requirements to the contrary, not to give greater power over cable service content to franchising authorities. Thus, for example, Section 625(d) continues to protect a cable operator's right to retier all services in any community meeting the definition of effective competition under the 1992 Cable Act.

Second, NATOA and King County argue that the Commission's preemption decision should be reconsidered and reversed because preemption is not required by the 1992 Cable Act. Again, NATOA and King County are incorrect. The statutory definition of the basic service tier sets out federally mandated minimum requirements, leaving additional programming choices squarely within the sole discretion of the cable operator.[72] If the Commission were to adopt petitioners' position and allow local franchising authorities to

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[71]King County at 21-24; NATOA at 29-32.

[72]See 47 U.S.C. § 543(b)(7). Specifically, each cable operator is required to provide a separately available basic service tier to which subscription is required for access to any other tier of service. At a minimum, this basic tier must include the broadcast signals distributed by the cable operator (excluding superstations), along with any public, educational, and government (PEG) access channels the system operator is required to carry. Additional video programming signals may be also be included at the discretion of the cable operator.

enforce provisions requiring the inclusion of particular services on the basic tier in addition to the minimum statutory requirements, the discretion clearly granted cable operators by the statute would be negated.

Finally, the Commission noted that the 1992 Cable Act's legislative history specifically discusses Congress' intent not to preempt franchise provisions requiring or permitting carriage of PEG channels on non-basic tiers. As the Commission recognized, had Congress "not intended to preempt provisions in franchise agreements specifying the contents of the basic tier, there would have been no need for the Report language on the specific question of PEG channels."[73] In short, both the plain language of the 1992 Cable Act and its legislative history clearly indicate that preemption is required.

XI. THE COMMISSION SHOULD CLARIFY ITS RULES REGARDING THE PROTECTION OF PROPRIETARY INFORMATION TO MAKE CLEAR THAT STATE AND LOCAL LAWS ARE PREEMPTED TO THE EXTENT THEY ARE NOT IDENTICAL TO THE REQUIREMENTS OF SECTION 0.459.

King County and the Michigan Communities have asked the Commission to clarify whether its rules regarding the protection of proprietary information preempt state and local laws.[74] In addition, the Michigan Communities suggest that the Commission amend Section 76.938 of the Commission's rules to make it clear that state and local laws regarding the confidentiality of proprietary information are preempted to the extent they are not

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[73]Order at ¶ 161.

[74]See King County at 20-21; Michigan Communities at 7-10.